Windemuller Electric, Inc. *and* Local No. 107, International Brotherhood of Electrical Workers, AFL–CIO and Local No. 131, International Brotherhood of Electrical Workers, AFL–CIO

Construction Employment Services, Inc. *and* Local No. 107, International Brotherhood of Electrical Workers, AFL–CIO

Windemuller Electric, Inc. and Construction Employment Services, Inc. *and* Local No. 107, International Brotherhood of Electrical Workers, AFL–CIO and Local No. 131, International Brotherhood of Electrical Workers, AFL–CIO. Cases 7–CA–30562, 7–CA–30888, 7–CA–30887, and 7–CA–30580

March 9, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On August 9, 1991, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent, Windemuller Electric, Inc., filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Windemuller Electric, Inc., Grandville, Michigan, and Construction Employment Services, Inc., Wyoming, Michigan, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] Respondent Windemuller Electric, Inc. has excepted to some of the judge's credibility findings. The Board's established policy is not to overrue an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the fifth sentence of the third paragraph of sec. IV,B, of the judge's decision, the date should be August 6, rather than August 16. We correct this inadvertent error.

In the absence of exceptions to the judge's finding that the discriminatees were ''employees'' entitled to the protection of the Act, Member Oviatt finds it unnecessary to address the judge's rationale in making that finding. See his dissent in *Escada (USA), Inc*., 304 NLRB 845 (1991).

Dwight A. Kirksey, Esq., for the General Counsel.
Peter Kok, Esq., of Grand Rapids, Michigan, for the Respondent Windemuller Electric, Inc.
Mr. Roosevelt Tillman, of Wyoming, Michigan, for the Respondent Construction Employment Services, Inc.
Mr. Robert Wuelfing, of Grand Rapids, Michigan, for Charging Party Local 107.
Mr. Al Moldovan, of Kalamazoo, Michigan, for Charging Party Local 131.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. These consolidated cases were heard at Kalamazoo and Grand Rapids, Michigan, on February 11 through 15, 20 and 21, 1991. The charges and amended charges were filed on May 17 and 23, June 7, and August 14 and 22, 1990, by Local No. 107 and/or Local No. 131, International Brotherhood of Electrical Workers, AFL–CIO (respectively Local 107 and Local 131 and collectively with other IBEW Locals, the Union).[1] The second amended consolidated complaint, which issued on December 27, alleges that Windemuller Electric, Inc. and Construction Employment Services, Inc., alleged joint employers (respectively the Company and CES and collectively Respondents) violated Section 8(a)(1) and (3) of the National Labor Relations Act. The gravamen of the complaint in sum is that: the Company unlawfully prohibited its employees from wearing union stickers on their hardhats; Respondents engaged in coercive interrogation of employees; and the Company refused to hire or consider for employment 29 named employees, and caused CES to lay off employees Larry Ketcham, Tom Sosnowski, and Steve Tishhouse, CES refused to hire, recall, or consider for employment employees Sosnowski and Sean Redner, and Respondents caused employee William Quick to be removed from the Upjohn Construction site, all because of their union membership or activities. Respondents by their respective answers deny the commission of the alleged unfair labor practices.

All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. The General Counsel, CES, and the Company each filed a brief.

On the entire record in this case[2] and from my observation of the demeanor of the witnesses, and having considered the arguments and briefs of the parties, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENTS

The Company, a Michigan corporation with its principal office and place of business in Grandville, Michigan, and a branch office near Kalamazoo, Michigan, is engaged in the electrical construction contracting business. In the operation of its business, the Company annually provides services valued in excess of $50,000 to enterprises which annually purchase goods valued in excess of $50,000 directly from suppliers located outside of Michigan. CES, a Michigan corporation with its principal office and place of business in Wyo-

[1] All dates herein are for 1990 unless otherwise indicated.
[2] Certain errors in the transcript have been noted and corrected.

ming, Michigan, is engaged in providing skilled and unskilled laborers to construction firms in Western Michigan. In the operation of its business, CES annually provides labor services valued in excess of $50,000 to the Company and other Michigan firms, each of which annually receive at their Michigan facilities goods and materials valued in excess of $50,000 directly from suppliers located outside of Michigan. The Company and CES are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Local 107 and Local 131 are labor organizations within the meaning of Section 2(5) of the Act.

III. BACKGROUND AND PRELIMINARY ISSUES

The operations of the Company and CES, alleged joint employer status, alleged supervisory status of Fred Syswerda, and the Union's role in connection with the alleged unfair labor practices

The Company has its principal Michigan office in Grandville (a suburb of Grand Rapids), a branch office in Kalamazoo (since 1989), and an office in Sarasota, Florida. Only the Company's Michigan operations are involved in this proceeding, and the evidence discussed herein concerns those operations. Michael Windemuller is company executive vice president and in charge of all Michigan operations. Windemuller testified that the managerial hierarchy consisted, in addition to himself of: Dan Beemer, vice president of engineering; Mark Windemuller, vice president of purchasing; Chuck Alles, treasurer-comptroller; Bill Dedoes, Kalamazoo branch manager; John Wiersma, serviceman-supervisor; three project engineers (Joe Halik, Dave Beemer, and Kevin Grime); and two general superintendents (Kirk Strong and Dick Thompson). The Company also has job foremen and sometimes assistant foremen. The General Counsel contends and the Company denies that the foreman (specifically in this case Barry Allen and his assistant and later successor Fred Syswerda) were supervisors under the Act. In 1990 the Company had over 300 projects, ranging in size from a few hundred dollars to over a million dollars, and employed between 130 and 150 employees. Windemuller described the Company as a merit shop and an open shop. Windemuller defined a merit shop as one in which employees were paid based on the work they did, and an open shop as one not signatory to a union contract, and not using a union as an exclusive service of referral. In fact, the Company does not use any union as a source of employees, either on an exclusive or nonexclusive basis. Windemuller testified that: ''Basically I believe an open shop would be a company that does not use people that have—that are in an organized union.'' From 1965 to 1970 the Company's employees were represented by Christian Labor Association (CLA). CLA was decertified following a Board-conducted election. At all other times the Company has operated nonunion. In 1978 Local 107 petitioned to represent the employees (Case 7–RC–14817) but lost the election. The Company is a member of the Western Michigan chapter of Associated Builders and Contractors (ABC), whose membership consists predominantly of nonunion firms. The Company utilizes its own workforce and from time to time hires employees. The Company, as needed, sometimes borrows employees from certain other contractors, all nonunion. Under these arrangements the contractors, rather than lay off employees, will loan them to the Company on an as-needed basis. These loaned employees work under the Company's direction but are paid by their respective employers, who are reimbursed by the Company for the employees' services. This system can be used only on a very limited basis, because when one contractor is busy, generally other contractors are also busy. Since September 1989, the Company has also used CES as a source of employees.

CES, formed in 1989, is operated by Roosevelt Tillman, its president and owner. Tillman has one clerical assistant. Tillman testified that CES is an employment agency for skilled and unskilled laborers within the construction industry. Tillman further testified in sum that he employs employees, sets their wage and benefit levels, and has authority to hire, fire, and discipline them. Tillman loans out employees to contractors, pursuant to agreements between CES and the contractor. While on the job, the employees work under the direction and supervision of the contractor. Tillman does not supervise employees on a contractor's jobsite, and rarely even visits the jobsites. CES pays the employee, and the contractor compensates CES for the employee's labor. On September 29, 1989, CES and the Company entered into an ''Agreement to Provide Services.'' The agreement provided in sum that CES would provide tradespersons to the Company in accordance with a compensation schedule, that CES would pay the employees their wages, provide their fringe benefits and maintain workers' compensation insurance, and that CES had ''sole discretion to recruit, train, evaluate, replace, supervise, discipline and terminate the tradespersons.'' However, CES agreed to withdraw any tradesperson determined by the Company to be unsatisfactory. The agreement further provided that the Company would provide the employees with all necessary safety equipment. The agreement stated that the tradespersons provided to the Company were employees of CES and not employees of the Company, and that CES was an independent contractor and not an agent or employee of the Company. The agreement was similar to that between CES and other contractors. Shortly after they executed the agreement, CES began furnishing workers to the Company. Company President Windemuller testified in sum that he met Tillman at an ABC meeting, learned of his services, and anticipated that Tillman could assist the Company in meeting its short term needs and meeting State of Michigan equal employment opportunity standards. In August 1990 the Company applied for a certificate of awardability from the Michigan Department of Civil Rights. On November 15, 1990 the Company received the certificate, which required the Company to comply with Michigan EEO standards as a condition of eligibility to obtain state and local government contracts.

Upon hiring employees, CES issued each a CES employee handbook. The handbook described CES as ''an employment agency which organizes the open shop tradespersons for better working continuity and vocational training.'' The handbook purported to set standards for layoff and recall, based on various elements of job performance, e.g., productivity, ''to promote open shop labor as a better skilled and more effective means of manning a construction site.'' The handbook further provided with respect to ''your supervisor,'' that: ''You are to work under the direction of the foremen and be responsible to that person.'' As indicated, this meant

the contractor's foremen. CES had no foremen. Also as indicated, the agreement between CES and the Company purported to give CES sole discretion to train, evaluate, and supervise employees. In fact, only the contractor could meaningfully perform these functions. CES was for all practical purposes a one-person operation. Tillman had neither the time nor ability to train, evaluate, or supervise personnel in all phases of construction work. It is evident that the standards for layoff described in the CES handbook could only be meaningfully determined by the contractors, and that Tillman would necessarily have to depend on the contractor's reports, if those standards had any significance. The handbook also set forth detailed work rules, including safety rules and obligations which both employees and contractors were expected to follow. The handbook further stated that CES would provide hardhats, the employees had to provide safety shoes and gloves, and the contractor would provide other safety equipment. In fact, the Company required all personnel, including employees furnished by CES, to wear its own hardhats. The handbook also instructed employees that if they had questions or concerns about safety policy or practices, ''speak to your foreman, supervisor or the [CES] office at once.''

Separate firms which ''share, or co-determine, those matters governing essential terms and conditions of employment'' of the employees involved, are joint employers of those employees, regardless of whether the firms are commonly owned, operated, or controlled. *NLRB v. Greyhound Corp. (Southern Greyhound Lines Division)*, 368 F.2d 778 (5th Cir. 1966), citing *Boire v. Greyhound Corp*., 376 U.S. 473 (1964). Accord: *NLRB v. Checker Cab Co*., 367 F.2d 692, 698 (6th Cir. 1966), cert. denied 385 U.S. 1008 (1967); *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1121–1124 (3d Cir. 1982).

Applying the foregoing test to the present case, I find that the Company and CES shared and codetermined the matters governing essential terms and conditions of employment of the ''tradespersons'' referred by CES, and therefore were the joint employers of those employees. Although CES nominally set the wage rates for the employees, those rates were limited and substantially determined by the agreement between the Company and CES, under which CES billed the Company on the basis of labor supplied, at an hourly rate, depending on the employee's qualifications, e.g., whether journeyman or apprentice. The Company thereby ''exercised indirect but effective control over the [referred employees'] compensation.'' *W.W. Grainger, Inc*., 286 NLRB 94, 96 (1987). As indicated, CES' handbook purported to set standards for layoff and recall. The evidence in this case, even on the basis of Respondents' own assertions, indicates that both have exercised the power to lay off or recall employees referred by CES. As will be further discussed, the Company selected alleged discriminatees Ketcham, Sosnowski, and Tishhouse for layoff, but CES recalled alleged discriminatee Quick from his work at the Company. The Company and CES shared hiring of employees. The Company reviewed CES' personnel files and selected which employees should be referred. Both the Company and CES exercised power to discipline referred employees, e.g., the Company directed referred employees to remove union stickers from their hardhats. As indicated, CES specifically instructed referred employees to work under the direction of the contractor's foremen. As the Company and CES were joint employers of the referred employees, ''each is responsible for the conduct of the other and whatever unfair labor practices are engaged in by the one (in connection with the referred employees) must be deemed to have been committed by both.'' *Mar del Plata Condominium*, 282 NLRB 1012 fn. 3 (1987).

Barry Allen, an inside journeyman wireman, began working for the Company in August 1989. The circumstances under which Allen came to work for the Company will be discussed further. At this point it is sufficient to note that Allen was a ''salt,'' i.e., a covert union organizer working for a nonunion contractor. In January 1990 the Company promoted Allen to the position of foreman. At the time the Company had two large subcontracts on the Upjohn project in Kalamazoo. The projects were respectively the Building 300 job, known as the power riser project, and the Floors 0 (ground level) and 1 project, for which the Company installed power and lighting. The Austin Company was general contractor for both projects. Allen was in charge of a crew on the Building 300 job. The crew size ranged from 2 (at the beginning) to 25, averaging from 16 to 18, including journeymen and apprentices. Allen testified that he was assigned to arrange the work on the job and act as a leader in getting the job done. Vice President Windemuller testified that foremen, including Allen, were responsible ''to lead the people that we put there, to get the job done and to coordinate the materials and coordinate with the other trades on the job, to make sure that we get our work done in a timely and efficient manner.'' Allen laid out the work for his crew, arranged to have materials available, kept time records on the employees, signed their timecards, prepared daily production reports for the Company and the prime contractor, and attended project, coordination, and safety meetings. He initially reported to Branch Manager Dedoes, later to General Superintendent Thompson, and to Mark Windemuller concerning materials. Allen also reported to Austin's project superintendent. No company personnel above the level of foreman were regularly on the project. Company managerial personnel (initially mainly Dedoes, later Thompson, and about monthly, Windemuller) visited the jobsite on a total average of about twice weekly. They would come more often if needed. The foremen had no authority to and did not hire, fire, lay off, recall, suspend, determine placement, transfer or formally discipline employees, or schedule their vacations. These functions were performed by Windemuller, Dedoes, General Superintendents Strong and Thompson, or Project Engineer Halik. If an employee acted improperly, the foreman would criticize the employee, or tell him to stop, and report the matter to the general superintendent. The foremen had authority to and did grant time off, e.g., when an employee wished to take off all or part of a day. The project manager (for the general contractor) and the general superintendent (for the Company) reviewed weekly the foremens' reports to determine if there were particular problems or needs which had to be addressed. Management requested the foreman to give information concerning employees' work performance and habits. However management also solicited such information from rank-and-file employees. The foremen were not systematically asked to make recommendations concerning merit increases. That function was performed by the general superintendents. The foremen also did not make recommendations concerning discipline or discharge. Allen made recommendations concerning the number of employees

needed on his crew or that a particular individual should be hired. His recommendations were not routinely or substantially followed. The Company paid its foremen an hourly wage, which included a $1- or $2-per-hour premium above the journeyman rate. Allen received a $2 premium because of the size of the job. Otherwise the foremen had the same wage structure and benefit package as rank-and-file hourly employees. Management personnel, i.e., above the level of foremen, were assigned company vehicles for their use, did not wear uniforms, were paid a salary, did not get overtime pay, had more medical coverage and a different benefit package than hourly rated employees, and received an annual bonus and paid vacations. Foremen, like rank-and-file employees, were not assigned company vehicles, wore work uniforms, received quarterly bonuses, were paid on an hourly basis, including overtime pay, and did not get paid vacations. Foremen employed by unionized (IBEW) electrical contractors in western Michigan are covered by the area collective-bargaining contracts and included in the bargaining unit.

The Company assigned Fred Syswerda as Allen's assistant foreman. Syswerda received a premium of $1 per hour. Allen instructed Syswerda to perform the same functions as Allen, namely, to keep an eye on the employees, answer questions, and keep the crews working. After Allen quit his job (in August 1990) Syswerda succeeded him as foreman. Allen's status, i.e., as an alleged 2(11) supervisor, is not directly at issue in this case. However the complaint alleges that in August 1990 the Company, by Syswerda, engaged in unlawful interrogation. In order to determine whether Syswerda was a supervisor under the Act, it is necessary to consider the evidence regarding Allen.

I find that the Company's foremen, specifically Allen and Syswerda, were not supervisors or agents of the Company within the meaning of the Act. Their authority and functions were substantially that of leadmen. They directed work in a routine manner, making use of their skill and experience as journeymen electricians. Disciplinary problems were simply passed on to the general superintendent, without recommendation as to what action should be taken. They played no formal, effective role in determining merit increases, although such determination was central to the Company's compensation system. Management personnel were not regularly on the job. However they were available and present when necessary to deal with personnel problems, and systematically reviewed progress on the job, determining problems and needs. Therefore, the fact that they were not regularly at the jobsite, did not indicate that the foreman had a supervisory status. Compare *Tri-County Electric Cooperative*, 237 NLRB 968, 969 (1978), in which the Board found that line foremen were not supervisors, although their immediate superior, the line superintendent, visited the jobsite as infrequently as once a month. Moreover the general contractor's project superintendent, to whom the Company's foremen also reported, was regularly at the site and directed all work. As indicated, the foremen had no authority to make important personnel decisions such as hiring, termination, lay off, transfer, or placement of employees, nor did the Company rely upon the foremen to make effective recommendations in these and other matters such as discipline, staffing, pay scale, or merit increases. I have also taken into consideration the prevailing area practice under which foremen are considered unit personnel, and share the same wage structure and benefits as rank-and-file employees. *Tri-County Electric Cooperative*, supra.

Historically the building trades unions erected a wall of separation between union and nonunion labor. That practice is reflected in the IBEW constitution and the bylaws and collective-bargaining contracts of its Local unions here involved (Local 107, based in Grand Rapids; Local 131, based in Kalamazoo, Local 445, based in Battle Creek; and Local 275, based in Muskegon, Michigan). The IBEW constitution prohibits a member from working for any employer ''whose position is adverse or detrimental to the I.B.E.W.'' The area contracts provide that the Union shall be the sole and exclusive source of referrals for employment. Company Branch Manager Dedoes was a member of Local 131, and worked for a union contractor. In 1986, after Dedoes went to work for the Company, internal union charges were filed against him by reason of his having ''secured his own employment with a non-signatory contractor, Windemuller Electric in direct competition with IBEW contractors in this jurisdiction.'' Local 131 found Dedoes guilty as charged, fined him $5000, and directed him to ''terminate all employment with any and all non-signatory employers.'' Dedoes did not comply with the Union's decision.

Historically also, the building trades unions, in areas where they were strong and a dominant factor in the industry, tended to tolerate nonunion subcontractors so long as they confined themselves to small jobs, or jobs not particularly desired by union labor, because of full employment or other reasons. In 1989 the Company obtained the two large Upjohn subcontracts. The Company began working on the power riser project in October 1989 and the Floors 0 and 1 project in January 1990. In the past this probably would have precipitated a picket line. However the electrical unions have apparently fallen on hard times. This time they used a different approach. Battle Creek Local 445 requested its salt, Barry Allen, to apply for work with the Company. Allen, a recent member of Local 131, had worked for some 20 years as an inside wireman. For nearly all that period he worked at Western Michigan University, whose maintenance employees were represented by AFSCME. Upon leaving Western Michigan University he began his career as a salt. In applying at the Company, Allen disclosed his employment at Western Michigan, but concealed his subsequent work history. He stated that he was a self-employed electrician. After he was hired, Allen, in accordance with his duties as a salt, sent reports to the Union, kept a diary, tape-recorded some employer meetings, and reviewed employee lists for telephone numbers. The Union compensated Allen by paying him the difference between his wage and union scale. In the meantime Allen competently performed his work for the Company. As indicated, the Company promoted him to foreman. By letter dated June 1, Local 131 informed the Company that Allen ''will be serving as our representative for the purpose of organizing.'' Local 131 also informed the Company that Allen gave testimony to the Board. The Company subsequently gave Allen a pay increase. On August 3 Allen, at Local 131's instruction, quit his employment with the Company. The Company does not contend that Allen's work performance was in any way unsatisfactory.

Allen is not alleged as a discriminatee in this proceeding. During his tenure at the Company, the Union encouraged its members to apply for work with the Company or CES. Some

were out of work or anticipated being out of work. However others were currently working at union scale when they applied to the Company. On October 18, 1989, a group of union members, including union officers, accompanied by Local 131 Organizer Alfredo Moldovan, went to the Company's Grand Rapids facility and presented written applications for employment. Another group of applicants was accompanied by IBEW Muskegon Local 275 President Doug Harmon, himself an applicant. Applicant George Vorgias also filed applications on behalf of five other union members. Two of the applicants (Chris Pena and Don Sidlauskas) were not identified in this record as being members of any IBEW Local. Some of the applications were accompanied by letters of reference from Moldovan. Local 131 compensated its member applicants for their time spent in applying for work at the Company. On January 29, 1990, Local 131 Executive Board Member Leroy Crabtree and member John Artz, accompanied by Moldovan, went to the Upjohn jobsite in Kalamazoo and presented job applications to the Company. Moldovan presented applications on behalf of Local 131 President Pat Klocke, Vice President Robert Fragala, and Executive Board Member Edwin Sturm. All but Sturm were also among those who applied on October 18, 1989. On May 14, 1990, Fragala and Klocke, and Local 131 member Greg Wolf, presented job applications to the Company at its Kalamazoo office. Christopher Widner, not identified as a union member, presented job applications to the Company at its Kalamazoo office on February 9 and again in March 1990. The Company never contacted any of the above-described applicants. The complaint alleges that the Company violated Section 8(a)(1) and (3) by refusing to hire or consider for employment the 29 applicants because of their union membership or union or concerted activities.

In March 1990 journeyman electricians Thomas Sosnowski, Stephen Tishhouse, and Larry Ketcham, all members of Local 107 or Local 131, were out of work. They sought work through the Union, which referred them to CES. CES hired them and eventually sent them to the Company to work at the Upjohn project. As will be discussed, shortly after reporting to work they displayed union insignia on their persons. William Quick signed an authorization card for Battle Creek Local 445, but was not a member. Quick applied to and was hired by CES, and in August 1990 CES sent him to the Company at the Upjohn project. Shortly after reporting to work Quick displayed an IBEW organizing committee pin. Quick testified (through company offer of proof) that before he reported to work at the site, Local 445's organizer gave him the pin, told him when to wear it, and informed him that the Union would inform the Company and CES (as it did) that Quick was engaged in organizational activities. Following his removal from the jobsite, Local 445 admitted Quick to membership. Sosnowski, Tishhouse, Ketcham, and Quick did not receive pay or expense money from the Union. As indicated the four are alleged as discriminatees in this proceeding. The complaint also alleges that CES discriminatorily refused to hire, recall, or consider for employment, Sosnowski and Local 107 member Sean Redner. Among the applicants and alleged discriminatees, only Local 275 President Doug Harmon was a full-time paid union employee. Five other applicants who held offices with their respective locals (Local 131 Examining Board Chairman Morris Appleby, Local 131 Executive Board Member Leroy Crabtree, Local 131 Vice President Robert Fragala, Local 131 Examining Board Member Joseph Haskins, Local 131 President Pat Klocke, and Local 275 Vice President Kathy Bolthouse) were eligible for compensation when they acted on official union business. As indicated, Local 131 compensated its members who applied on October 18, 1989. Otherwise the Union did not compensate any of the alleged discriminatees.

The Company contends (Br. 52) that ''the alleged discriminatees were not bonafide applicants for employment because of [the Company's] belief that they were paid union organizers.'' As I indicated at the hearing, I find this argument without merit as a matter of law. At the hearing, the Company and CES did not argue that they refused to hire or consider for employment any of the alleged discriminatees, or took personnel action against them, because of their actual or perceived status as union organizers. None of the Respondents' witnesses made such a contention. Rather, the Company argues in sum that by reason of their actual or perceived status as ''paid union organizers,'' the alleged discriminatees, fell outside of the class of ''employees'' who are entitled to the protection of the Act. The argument is without merit. All union members are in a real sense, union organizers. This is the nature of labor organizations. They exist for the purpose of mutual aid and protection, and their goal is to organize as many employees as possible. All of the alleged discriminatees were working electricians. None were by profession union organizers. They are members of the ''employee class,'' and therefore ''entitled to the Act's protection.'' *Oak Apparel, Inc*., 218 NLRB 701 (1975); see also *Willmar Electric Service*, 303 NLRB 245, 246 (1991); *Pilliod of Mississippi, Inc*., 275 NLRB 799, 811 (1985); *Holbrook Knitwear, Inc*., 169 NLRB 768, 771 (1968). It is immaterial whether the alleged discriminatees sought employment with the Company or CES principally for organizational purposes or whether they received any reimbursement from the Union. Given the transient nature of employment in the construction industry, it would be difficult to engage in an organizational campaign without some preconceived plan. If persons who worked at the trade were denied protection of the Act because they sought employment for organizational purposes or accepted union reimbursement, this would seriously impede organizational activity in the construction industry. Some might argue that in view of prior history or union discrimination or exclusivity in the industry, the construction unions would simply be getting their just desserts. However two wrongs do not make a right. As the Board pointed out in *Oak Apparel*, supra: ''Members of the 'employee' class have been held entitled to the Act's protection whether the interference with their rights has come from employers or from unions.'' I also reject the Company's suggestion that the alleged discriminatees and the Union were somehow engaged in a campaign to destroy the Company's business. In support of this suggestion, the Company offered in evidence a videotape of an address by the IBEW International president, in which he exhorted the membership to ''drive the nonunion element out of business.'' The employees here involved who obtained employment with the Company, including Barry Allen, performed their work for the Company. The Company does not contend that their work performance was in any way deficient. As indicated, the Company was highly impressed with Allen's performance.

The Act does not view union loyalty as inconsistent with loyalty to one's employer and job. I interpret the IBEW president's statement as an exhortation to fully organize the electrical contracting industry, and in this way to drive out the nonunion element. Unions do not exist for the purpose of depriving their members of employment opportunities. Moreover, insofar as the Company relies on certain court decisions indicating that union organizers are not entitled to protection against employment discrimination, I interpret those decisions as referring to professional organizers. Among the employees involved in this case, only Barry Allen could arguably be regarded as one whose occupation was that of union organizer, and Allen is not an alleged discriminatee. I find that the alleged discriminatees were employees within the meaning of the Act, and entitled to the Act's protection against employment discrimination.

At this point I shall address the merits of the complaint allegations. Chronologically the first allegations pertain to alleged refusal to hire or consider for employment. However I shall first deal with the allegations of alleged unlawful layoff or removal from work, and related alleged interference with union activity or coercive conduct. I do so because the later events have actual or potential evidentiary significance concerning the allegations of refusal to hire or consider for employment.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Union Stickers on Hardhats, and the Layoff of Ketcham, Sosnowski, and Tishhouse*

On May 9 or 10 Company President Windemuller and Superintendent Strong met with CES President Tillman. They discussed minority recruitment. Windemuller looked at some 20 to 30 applications of CES employees, and selected 10 who could be referred to company jobs. Among these were four or five whose work history indicated that they were probably union members, i.e., they worked for union contractors at union scale and/or were trained through the Union's apprenticeship program. They included journeymen Thomas Sosnowski and Stephen Tishhouse, and apprentice Mike Stackpole. Also selected were journeyman and Local 131 member Larry Ketcham and journeyman Randy Miller, whose applications did not indicate probable union membership. (Ketcham testified that at Organizer Moldovan's request, he submitted an application which falsely indicated that he worked for nonunion contractors. The Union wanted to see if Respondents would discriminate between union and nonunion applicants.) Tillman referred the five employees to the Company, and they reported to work at the Floors 0 and 1 project on Monday, May 14. Their referral sheets from CES (Tradesperson's Job Information) indicated an estimated job length of 1 month. Tishhouse and Ketcham testified that Tillman told them the job would last about one month. Tillman testified that Strong told him the job would last 1 to 2 weeks, but he told the employees 4 weeks, because contractors usually underestimate the duration. Windemuller testified that he anticipated the Company would need the employees ''for a week or two or possibly longer, depending on when some other people came off their projects.'' Strong was not presented as a witness.

When they reported to work, the employees were given gold-colored hardhats. Each contractor on the job used a distinct color hardhat. Company personnel normally wore green hardhats, but on this job the general contractor designated gold for the Company. Each company hardhat bore two stickers: a safety sticker which bore an emergency phone number, and a company sticker containing the Company's name. On their second day at work Sosnowski, Tishhouse, Ketcham, and Stackpole appeared wearing union buttons and T-shirts, and union stickers on their hardhats. The stickers each measured about 2-1/2 by 1-3/4 inches, and consisted of an American flag, and underneath a union logo with the slogan ''BUY UNION—BUY AMERICAN.'' Branch Manager Dedoes and Superintendent Thompson were at the site and saw the employees. Thompson, who knew Tishhouse, asked if he was still in the Union and if the Union knew he was working there. Tishhouse answered yes to both questions. Dedoes, who knew Ketcham (they both worked for a union contractor) said nothing. Barry Allen testified on direct examination that Thompson was visibly angry and told him that ''those union people shouldn't be wearing union buttons and stickers on Windemuller's hardhats because Windemuller wasn't a union contractor and they should take those stickers off.'' On cross-examination by company counsel, Allen testified that Thompson said the hardhats were company property and it was against policy on the site. Neither the Company nor the general contractor had previously announced any policy prohibiting stickers on hardhats. The following day Thompson told Allen to summon the employees who were wearing the union stickers on their hardhats. Thompson told the employees that they should remove all stickers from their hardhats (including the American flag) except the safety sticker and the company sticker. Sosnowski testified that Thompson said they were working for Windemuller and these were Windemuller hardhats, Windemuller was not a union company and they did not intend to join the Union, and they did not want the employees to have the union stickers on their hardhat. Tishhouse testified that Thompson asked them to ''remove the stickers from their hardhats since it was their property and they didn't want the IBEW stickers on their hardhats.'' The employees removed the stickers and returned to work. Thompson said nothing about the other union paraphernalia, and the employees continued to wear them.

Company Vice President Windemuller testified in sum as follows: He instructed Thompson to tell the employees to remove the stickers, for two reasons. First, ''it detracts from the professionalism we are trying to project to our customers.'' The second reason concerned an OSHA instruction, stamped inside the hat: ''Never alter or modify the shell or suspension system.'' A MIOSHA (Michigan) safety person told him that stickers probably were not a good idea because they could hide cracks which would require replacement of the helmet. Thompson reported that the employees wore union stickers on their clothing. Windemuller told Thompson to ignore it. (The Company's own employees wear company-issued uniforms, but employees referred by CES wear their own clothing). Thompson did not testify as a witness in this proceeding. Consequently the testimony of General Counsel's witnesses concerning his statements stands uncontradicted.

I find that the Company violated Section 8(a)(1) by prohibiting its employees from wearing union stickers on their hardhats. ''The right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity. . . . A rule which curtails that

employee right is presumptively invalid unless special circumstances exist which make the rule necessary to maintain production or discipline, or to ensure safety.'' *Malta Construction Co.*, 276 NLRB 1494 (1985), enfd. 806 F.2d 1003 (11th Cir. 1986). As *Malta* indicates, these principles apply to employer furnished hardhats. I do not credit Windemuller's testimony concerning his professed reasons for directing the employees to remove the union stickers. The real reason was given by Superintendent Thompson, as indicated by the uncontroverted testimony of General Counsel's witnesses. Windemuller wanted the stickers removed because the Company was a nonunion firm, and therefore he did not want any union identification on the hardhats, which he regarded as company property. It is significant that Thompson repeated this reason to the employees after consulting with Windemuller. Windemuller's professed reasons were pretextual. They would equally apply to the company stickers on the hardhats. As the company personnel wore distinctive colored hardhats, there was no need for a company sticker. Nevertheless, the Company placed its sticker on the hardhats and never directed their removal. No Federal or state rule prohibited stickers on hardhats. The Company failed to give a credible and valid explanation for its action. Therefore the action was unlawful.

The following day (Thursday, May 17) Thompson informed Allen that Sosnowski, Ketcham, and Tishhouse would be laid off on Friday, May 18. Allen so informed the employees, and they were laid off. Miller continued to work until he quit in late July. Stackpole continued to work for the Company until laid off in late November. Allen testified in sum as follows: He told Thompson that the layoff was contrary to what Superintendent Strong told him. Strong told Allen that borrowed employees from Allied Electrical, Inc. (Allied) would be laid off first, because they cost the Company more than the other employees on the job. Thereafter employees would be laid off on the basis of last in, first out. At the time there were five Allied employees on the job. They began work about a week before the CES employees arrived. Thompson answered that Dedoes said to lay off the three union people first. Allen replied that there were four. Thompson responded that they would keep Stackpole because he cost less than the others. The following week one of the Allied employees (Dennis Hofer) quit, and the other four were sent back to Allied at the end of the week. Meanwhile, on Monday, May 21, the Company brought in newly hired apprentice James Bazen as ''summer help,'' and transferred in three company employees from another job that was winding down. Allen subsequently testified that he did not know whether the job was winding down. Allen testified that the three employees possibly were Todd Meert, Adam Russell, and Dick Quick. Sosnowski, Tishhouse, and Ketcham testified in sum that when they reported back to CES, Tillman expressed surprise that they were returned so soon, and asked if anything went wrong. Tishhouse testified that it looked like the job was just getting started, and there appeared to be enough work for about 2 weeks. Ketcham testified that there appeared to be 3 to 6 months' work in the area in which they were working, and the work they were then doing would take about a month. Tillman testified that superintendent Strong told him the three employees ''did a great job, but we are all caught up now.''

Vice President Windemuller testified in sum as follows: The three employees were laid off because they were no longer needed, and not because of their union stickers. The Company had its own employees on the power riser project. Austin notified the Company to stop work because Austin had to bring in some large equipment. The Company was installing conduits, and Austin could not move in the equipment if the conduits were installed. Austin said the Company could not complete its work until July. The Company transferred Todd Meert, Adam Russell, and one other company employee to the Floors 0 and 1 project, and laid off the three CES employees. Branch Manager Dedoes corroborated Windemuller's testimony concerning the transfer. However they did not testify why the CES employees rather than borrowed employees were selected for layoff, or why Randy Miller was not selected for layoff. As indicated Thompson was not called as a witness. Superintendent Strong also was not called as a witness. Consequently Allen's testimony concerning the statements of Thompson and Strong (layoff policy and selection of ''the three union people'') was uncontradicted. The Company also did not present any corroborative testimony from Austin.

The Company's records tend to undercut Windemuller's explanation and to support General Counsel's position. The Company paid Allied $20.48 and $18.75 per hour for journeyman labor, while it paid only $16.50 per hour for the CES journeymen. The records further indicate that during the construction season from May to November 1990, the Company maintained a work force which normally included four CES employees. After the layoff the number dropped from five to two. Thereafter in June the number increased to three, then to four or five, and stabilized at four from August to November. Meanwhile the Company relied heavily on borrowed labor. The Company continued to use labor borrowed from Allied, including journeymen, through the week ending June 17, except during the week ending June 3. Beginning the week ending May 18, the Company used two borrowed employees from Feyen-Zylstra Electric Inc. (Feyen-Zylstra). The rate of compensation ($19 per hour for Kevin McGuire and $15.75 for Gary Lasecki) indicates that McGuire and possibly Lasecki were journeymen. Lasecki worked for the Company until late July and McGuire until early September. The Company also used a borrowed employee from Espen Electric during the period August 8 through 14. As indicated, the Company laid off three journeymen from CES. The three employees who according to Windemuller, replaced them, included one journeyman (Russell), one apprentice (Meert), and an unidentified employee. The Company was aware of the prime contractor's requirement that every subcontractor maintain a ratio of one journeyman to one apprentice on the job. Therefore, it is evident that the Company could not have replaced all three laid-off employees with its own personnel. Rather, at least one or two of them must have been replaced by borrowed journeymen, contrary to the Company's policy of first laying off borrowed employees. Windemuller's explanation is not credible.

I find that the Company caused the layoff of Ketcham, Sosnowski, and Tishhouse because of their union activity. The Company thereby violated Section 8(a)(3) and (1). When the four union employees displayed union paraphernalia on their person, thereby indicating that they intended to engage in organizational activity, the Company immediately and un-

lawfully ordered them to remove the union stickers from their hardhats. The next day the Company ordered the layoff of the three union journeymen, contrary to its usual practice of laying off borrowed employees before laying off CES personnel. The Company offered no explanation for laying off the three union journeymen while retaining Randy Miller, the only of the five CES personnel who did not wear union insignia. Rather, as indicated Superintendent Thompson expressly stated that Dedoes told him to lay off the three union people first. On the basis of the Company's demonstrated hostility toward the union organizational activity, the timing of the layoff, and Thompson's admission, the General Counsel presented a prima facie case that the Company laid off Ketcham, Sosnowski, and Tishhouse because of their union activity. As the Company's professed reason for laying them off was pretextual, it follows that the Company failed to meet its burden of establishing that it would have laid off the employees in the absence of such activity. It is immaterial that the Company did not lay off Stackpole. Having removed the three union journeymen, the Company effectively broke the incipient union organizational campaign. It is also immaterial that the Company approved Sosnowski, Tishhouse, and other employees for hire, knowing they probably were union members. As will be further discussed, the Company was willing to accept union members as employees, provided they maintained a low profile. However the Company was not willing to keep or accept employees who engaged in union organizational activity or whose actions indicated that they might engage in such activity.[3] As indicated, CES told the employees the job would last about a month. Tillman testified that contractors usually underestimate the duration, and Miller and Stackpole remained much longer than 1 month. I find that absent the discrimination against them, at least two of the discriminatees also would have worked much longer than 1 month, and that the duration of employment of borrowed and/or CES journeymen may be considered as a measure of the Company's backpay liability.

B. *Layoff or Removal of William Quick, and Related Alleged Interrogation*

Bill Quick, a master electrician, was hired by CES on Monday, August 6, was sent to the Company at the Upjohn project, and commenced working the next day.[4] His application indicated that he briefly worked for Kemp Electric, a union contractor, and previously was a self-employed contractor. The CES tradesperson job information form indicated an estimated job length of 1 to 2 weeks. Quick testified in sum as follows: Tillman told him the job should last until early October. When Quick reported to the site, Thompson introduced Fred Syswerda as his foreman. (Syswerda had just succeeded Barry Allen.) After assigning his work, Syswerda asked Quick if he had any union affiliation or belonged to any union or was connected with any union. Quick answered that he was not a union member. On Thursday (August 9), his third day at work, Quick wore a union organizing committee pin at work. He did not see Thompson on the site after Tuesday, and did not know if Syswerda saw the pin. The next morning (Friday) Syswerda told him that Tillman came by on Thursday evening with a timecard and CES handbook, and would call him. Later that morning Syswerda told Quick that he was disappointed with Quick, because he lied when he said he was not affiliated with any union. Quick responded that he did not lie because he was not a member of a local union. Syswerda again said he was disappointed. Syswerda had previously given permission to Quick to leave work at noon in order to go out of town for the weekend. Quick checked again, and Syswerda said there was no problem, and he was satisfied with Quick's work. After leaving work Quick called CES. Tillman told him he would not be working at the site any longer, and should report to the CES office on Monday (August 13). At the time Quick and his assigned coworker were hanging light fixtures and had not completed their assigned work. When Quick reported to CES, Tillman told him he had some work to be done at his mother's house. They looked at the proposed job, and Quick asked to begin on Tuesday (August 14) Quick worked there for 2 days. On Thursday he went, at Tillman's instruction to purchase materials for a service change. On Friday he went to obtain a Michigan license, because Tillman wanted to employ him as an electrical contractor. The following Monday (August 20) Quick presented Tillman with timecards for 4 days. Tillman rejected pay for Thursday and Friday, saying that Quick did not do any productive work on those days. Tillman offered to employ Quick as an electrical contractor at $13 per hour. Quick, who had been working at the company job at $12 per hour, objected to the rate and asked if Tillman had any more work as a journeyman at $12 per hour. Tillman said he had none. Quick did not thereafter work for CES. The parties stipulated that by letter dated August 8 Local 445 informed the Company and CES that Quick was engaged in organizing activities, and that Respondents received the letter on August 9.

Journeyman Darwin Patterson replaced Quick at the Upjohn project. CES hired Patterson on August 10. CES sent him to the Upjohn project. He commenced work on August 13 and continued to work there until he quit in mid-September. Patterson testified in sum as follows: He was a union member, but had worked only for non-IBEW contractors. He applied for work at CES on March 15. Tillman told him there wasn't much doing then, but might be openings in the future. On August 7 Patterson saw an ad (placed by CES) for electricians. He again went to CES, and Tillman again interviewed him. Tillman asked if he was union. Patterson answered he was not. Tillman responded that Patterson could lie about it, but that Tillman usually could tell by talking to someone whether they're being truthful or not. Tillman hired Patterson, who never disclosed himself as a union adherent.

Syswerda was not presented as a witness. Windemuller testified that CES removed Quick, and the Company never requested his removal. Windemuller testified that Superintendent Strong subsequently told him that Tillman said he wanted Quick on another job, and that CES sent a substitute. Tillman testified in sum as follows: Quick's application indicated he had a union background, as he worked for a union contractor. Tillman hired Quick on August 16 and sent him to the Company, where he worked for 3-1/2 days. On

[3] Windemuller testified that employee Marian Van Koevering wore ''a pencil holder that said something about IBEW on it.'' However she had been a company employee for 12 years, and there was no indication that she was about to engage in organizational activity.

[4] Quick testified that he was hired by CES on August 13. However, the Company and CES records indicate that, as testified by Tillman, the chain of events began a week earlier.

Wednesday, August 8, Tillman left a message on Quick's telephone answering machine ''to call me Friday, report back to the office Friday for reassignment.'' (CES presented in evidence a telephone bill indicating a call to Quick's home at 7:10 p.m. on August 8.) Tillman had a job to remodel his mother's home (in an apartment building) including consolidation of electrical service. Quick said he had homebuilding skills, and Tillman understood he was a licensed contractor. In his investigatory affidavit to the Board Tillman stated that on the evening of August 8 ''I contacted Mr. Quick by calling his answering machine and leaving a message for him to see me when he stopped by the CES office for his check that Friday.'' He did not state ''for reassignment.'' Tillman testified that his affidavit was incorrect, because Quick was not yet due a paycheck. Tillman further testified, as he indicated in his affidavit, that on Thursday morning he visited the Upjohn jobsite to bring Quick some information, including a CES handbook and CES literature. He could not locate Quick, and left the material at the Company's trailer. Tillman further testified in sum as follows: Quick reported to the CES office on Friday afternoon. Tillman explained the job, and Quick agreed to do it. Tillman did not tell the Company why he removed Quick from the Upjohn project, but simply sent Patterson as a replacement. The Company did not ask him to remove Quick. Quick reported to the new job on Monday, August 13, and they discussed the job. Tillman told Quick to purchase the materials and Tillman would reimburse him. Quick worked on Tuesday and Wednesday, but not on Thursday. On Friday Quick told him he went to purchase materials, but needed to update his contractor's license in order to proceed with the service changes. Tillman thought this was already done, but Quick said his license expired. On Monday, August 20, Quick came to the CES office. He wanted more money for the job, including pay for Thursday and Friday. Tillman said he couldn't afford it, and that Quick didn't work on Thursday and Friday. Quick walked out. Tillman considered that Quick quit. Tillman testified that the Company did not tell him not to refer people with union or IBEW background, and that he did not interrogate Darwin Patterson about his union background.

As found, Foreman Syswerda was not a supervisor or agent of the Company. Therefore I am recommending dismissal of the allegation that the Company, by Syswerda, engaged in unlawful interrogation. I have not taken Syswerda's statements into consideration in determining the merits of Quick's removal. However I find incredible, Tillman's explanation for the removal of Quick from the Upjohn job. On Thursday, August 9, Respondents learned (through Local 445's letter, or Quick's open display of a union organizing pin, or both) that Quick was engaged in union organizing activity. The next day Quick was removed from the job. Three months earlier, the Company similarly removed three CES employees from the site when they displayed union paraphernalia, thereby indicating that they intended to engage in organizational activity. Tillman, through CES, was engaged in the business of furnishing skilled and unskilled labor to nonunion construction firms. He was not engaged in business as a building contractor. The Company's records indicate that CES usually referred electricians to the Company for extended periods of time, ranging from about 1 to 6 months, until the Company no longer had work for them. If as claimed by Tillman, he felt free to arbitrarily pull a qualified employee off a company job after 2 days' work, for his own convenience without notice to the Company, thereby forcing the Company (again without notice) to familiarize the replacement with the work, then it is probable that CES would not last long in business. It is also unlikely that within 2 days of dispatching Quick to the Upjohn project, Tillman would suddenly realize that he needed Quick to remodel his mother's home. At the time he hired and dispatched Quick, Tillman already knew all he had to know: that Quick had building skills and was a master electrician, and that Tillman's mother's home could use some remodeling. Nevertheless, he dispatched Quick to the Company. If Tillman were sincerely interested in having Quick do the remodeling work, then it is probable that he would have waited until the fall, when the Company was winding down, and then offer Quick a nice indoor job. There was nothing urgent about the remodeling job. I also credit Patterson's testimony concerning his interview with Tillman. As discussed, Tillman gave a false explanation of his telephone call to Quick, and his explanation for removing Quick from the Upjohn project was demonstrably incredible. I have no comparable reservations with respect to Patterson's credibility. CES violated Section 8(a)(1) by interrogating Patterson about his union affiliation. ''The Board has long recognized that questions involving union membership and union sympathies in the context of a job interview are inherently coercive and thus interfere with Section 7 rights.'' *Presbyterian University Hospital*, 295 NLRB 1139 (1989), enfd. 914 F.2d 244 (3d Cir. 1990). Moreover, Tillman's strong language demonstrated that he intended the questioning to have a coercive effect. His stern warning to Patterson, i.e., that the truth would out, plainly conveyed the message that Patterson had better not be a union adherent. Tillman's unlawful interrogation further demonstrates a discriminatory motivation on the part of both Respondents. Tillman had no reason to be concerned about whether Patterson was a union member, unless the Company was so concerned. It is evident, particularly in light of the unlawful termination of Ketcham, Sosnowski, and Tishhouse that the Company did not want another Bill Quick on the job.

I find that Respondents caused Quick to be removed from the Upjohn project because the Union and Quick indicated that Quick intended to engage in organizational activity. As of August 8, they had no intention to terminate Quick. The circumstances indicate that Tillman probably called Quick that evening to tell him that Tillman would be bringing CES material to him the next day (which Tillman did). When Respondents learned of Quick's union activity, the Company did not (as it did in May), have a ready excuse to remove the offending employee. Therefore the Company left it to CES to come up with some pretext to get rid of Quick. Tillman dutifully carried out this assignment. I further find that by offering Quick only an arrangement as an independent contractor, Tillman effectively terminated Quick as an employee. Tillman did so for the same motivation as Respondents in removing Quick from the Upjohn project. It follows that CES further violated Section 8(a)(3) and (1) by terminating Quick. On the basis of the timing and abrupt circumstances of Quick's removal, the Company's demonstrated hostility toward union organizational activity, and Tillman's subsequent coercive interrogation of Patterson, the General Counsel presented a prima facie case that Respondents re-

moved Quick and CES terminated Quick because of his union activity. As Respondents' explanation for their action was pretextual, Respondents failed to meet their burden of establishing that they would have removed or terminated Quick in the absence of such activity.

C. *Additional Alleged Interrogation by CES, and Alleged Unlawful Refusal by CES to Hire, Recall or Consider for Employment Tom Sosnowski and Sean Redner*

Residential journeyman Keith Wolfsen applied for work with CES on September 20. Wolfsen testified that although working, he had too far to commute, and Local 131 Organizer Moldovan suggested he apply to CES. Wolfsen was a member of Local 131. However his CES application form did not indicate a probability of union membership. Wolfsen did not answer a question on the form to: ''List current professional affiliations and organizations.'' Prior to Bill Quick's termination CES did not include this question on its application form. Wolfsen testified that when Tillman interviewed him, he asked whether Wolfsen ''belonged to any associations.'' Wolfsen answered that he formerly belonged to a refrigeration engineers' society. Tillman described CES as an organizer for contractors filling in for lack of their own people. Tillman added that he was nonunion, and his calls would be one contractor to another. The next day Tillman offered Wolfsen a choice of two jobs. Wolfsen chose a journeyman's position with the Company at the Upjohn project, at $12 per hour. Tillman said the job would last 2 weeks or more, depending on Wolfsen's performance. Wolfsen began on September 24 and worked until late November, when the Company laid off all CES personnel. Wolfsen never disclosed his union membership. Tillman, in his testimony, did not deny Wolfsen's testimony.

I find that CES violated Section 8(a)(1) by coercively interrogating Wolfsen concerning his union membership. At the time Tillman interviewed Wolfsen, the present unfair labor practice charges were pending, including allegations, filed on August 14 and 22, that Tillman unlawfully questioned applicants about their union membership. Tillman took a more subtle approach. On the CES application form, he directed applicants to list their current professional affiliations and organizations. He expressly asked Wolfsen whether he belonged to any ''associations.'' Tillman had no legitimate reason for asking these questions, and offered no explanation. The terms ''professional organizations'' and ''associations'' are broad enough to encompass unions. See Section 2(5) of the Act, definition of ''labor organization.'' Lest there be any doubt of his implication, Tillman pointed out that CES was nonunion. Wolfsen's interview occurred against a background of recent unfair labor practices by Tillman. His questioning of Wolfsen was unlawful, and may be considered as evidence of unlawful motivation in connection with the next allegations against CES. *Presbyterian University Hospital*, supra.

The complaint alleges that since on or about September 21 CES refused to hire, recall, or consider for employment employees Tom Sosnowski and Sean Redner, because of their union membership and activities. The thrust of the allegation (G.C. Br. 10) is that Tillman hired and referred Keith Wolfsen to the Company, believing him to be nonunion, in preference to Sosnowski and Redner, whom he knew to be union.

Sosnowski testified in sum as follows: On the Friday after being laid off from the Company (May 25), he went to CES to pick up his paycheck. The receptionist told him there was no work for electricians at that time. A few days later Sosnowski called CES, because Local 107 Organizer Wuelfing told him that CES was sending out electricians. Tillman told him he had just filled a call and had nothing else at the moment. On May 29 Tillman left a message with his wife that he should call. Sosnowski returned the call, but Tillman said the job was now filled. Sosnowski asked about the job. Tillman described a job in Kalamazoo for a fourth year apprentice, which paid $10 per hour. Sosnowski said he could not have afforded that anyway, and pointed out that he was a journeyman.[5] About a month later Sosnowski stopped at the CES office and asked the receptionist if there was any work for electricians. She said they had just laid off a bunch of electricians. In November Sosnowski filed a new application with CES. This time the form indicated that the application was valid only for 30 days. No time limitation was indicated on his initial application in April. The receptionist again said they had just laid off a bunch of electricians. About December 1 Sosnowski went to CES and renewed his application. In September Sosnowski installed a telephone answering machine in his home. However Sosnowski never received any messages from CES.

Journeyman and Local 107 member Sean Redner testified in sum as follows: In August he was out of work. On August 9, at the suggestion of Organizer Wuelfing, he went to CES and filled out an application. Redner made no effort to conceal his union identification. Redner listed his work history, indicating that all but one of the contractors for whom he worked were union contractors. Redner also indicated that he was trained in the Union's apprenticeship program. He listed Wuelfing and Local 107's business manager as references. Redner gave his address and the telephone numbers of his union references, but did not list his own telephone number. Redner has a telephone answering machine, and his number is listed. Redner testified that there was no place on the application for a telephone number. Redner's application was not presented in evidence. Those CES applications which were offered in evidence, all indicated a space for home telephone number. Redner further testified that the receptionist told him the application would be in effect for 1 year, and if Redner had any questions, he could call either herself or Tillman. Redner never spoke personally to Tillman and never heard from CES.

Windemuller and Tillman testified in sum that the Company did not request CES to furnish only nonunion employees. Tillman further testified in sum as follows: When Ketcham, Tishhouse, and Sosnowski returned from the Company, he had no work for them. On May 29 he had a job for a journeyman with John Davis Electric, for residential and commercial work. Tillman called Sosnowski, but there was no answer. He next called Ketcham, who said he did not want residential work. Tillman next called Tishhouse and left

[5] Sosnowski initially testified that Tillman called within a month after he called Tillman. However Sosnowski admitted on cross-examination that Tillman called him about May 29, i.e., shortly after he called Tillman.

a message on his answering machine that he had a job. Tishhouse never returned the call. CES presented in evidence a telephone bill indicating that calls were placed from CES to Ketcham and Tishhouse on May 29 at 2:49 p.m. and 2:50 p.m., respectively (calls to Sosnowski would be local). Another time Tillman called Sosnowski, and this time reached him. Tillman offered him a job at $10 per hour. Sosnowski said that was apprentice rate, and not enough, because he was journeyman. None of the three employees indicated that they wished to be considered further, and Tillman did not call any of them again. Tillman did not testify directly concerning Redner's application. However Tillman testified that both application forms used by CES have a place for applicant phone number, and that if the applicant does not put down his or her phone number, he will not attempt to locate the applicant by other means. CES' receptionist was not called as a witness. Ketcham testified in sum as follows: When the three employees returned to CES from the Upjohn project, Tillman said he would keep them on file and give them a call. The following week Tillman left a message on Ketcham's answering machine. Ketcham returned the call, and Tillman said he had a job. Ketcham turned it down, explaining that ''it had probably been a long time since I'd ever run a Ronex (?) and that I don't think it would probably be fair to that contractor for me to take that job.'' Since then Ketcham has not heard from CES. Tishhouse testified in sum as follows; When the three employees returned to CES from the Upjohn project, they said they were available for another job. Tillman said he would be in touch with them. Some 2 to 4 weeks later Tillman left a message on Tishhouse' answering machine. Tishhouse did not return the call because he had obtained other employment. He had no further contact with CES.

I credit Tillman's testimony that he twice called Sosnowski in order to offer him employment. It is undisputed that Tillman called Ketcham and Tishhouse. Ketcham's description of the job offer indicates that it was not the same as the fourth year apprentice job described by Sosnowski. CES' records indicate that Tillman called Tishhouse immediately after calling Ketcham. If so, then it is probable, as testified by Tillman, that he also called Sosnowski to offer the same job. It is undisputed that Tillman called Sosnowski on another occasion, in connection with the apprentice job. It is unlikely that Tillman would call Sosnowski simply to tell him that he had filled a job. Rather on both occasions Sosnowski was not available when Tillman called. Given the nature of referrals in the construction industry, which require prompt action, Tillman had no alternative but to keep calling until he filled the contractor's request. Therefore it is not surprising that when Sosnowski got around to calling CES, Tillman had filled the job or jobs.

If the complaint alleged that CES refused to refer Sosnowski in July for discriminatory reasons, I might be inclined to find a violation. Sosnowski testified without contradiction that about that time he spoke to Tillman's receptionist, asked about work, and she said they had just laid off a bunch of electricians. The Company's records indicate that in July CES referred five employees to the Company, including two (Barnett and Hambley), whose compensation rate to CES indicates they were probably journeymen. However the complaint does not so allege, and Respondents were not put on notice of any such allegation. Rather the complaint alleges that CES refused to hire, recall, or consider Sosnowski for employment on and after September 21. For remedial purposes there may be no practical difference. As discussed, the duration of employment of CES and/or borrowed employees may be considered as a measure of the Company's backpay liability.

I find that the General Counsel presented a prima facie case that CES failed to recall Sosnowski, hire Redner, and refer either of them to the Company, because they appeared likely to engage in union organizational activity. Specifically, the General Counsel presented evidence that the Company was disposed not to tolerate employees who engaged in such activity, and that CES cooperated in removing Quick from the Upjohn job because of such activity, coercively interrogated Patterson and Wolfsen in order to determine whether they were union members, and hired and referred Wolfsen, who appeared to be nonunion, while failing to refer Sosnowski and Redner, who were demonstrably union adherents. However I find that CES has met its burden of establishing that CES would not have referred Sosnowski or Redner to the Company on or after September 21, even in the absence of their union membership or affiliation. As of September 21 (when CES referred Wolfsen), nearly 4 months had passed since Sosnowski had any personal contact with Tillman. On two occasions around June 1 when Tillman called, Sosnowski could not be reached. In these circumstances Tillman could reasonably believe, as of September 21, that Sosnowski was not a prospect for immediate employment. To this extent I credit Tillman's testimony. As indicated, Sosnowski testified that in September he installed a telephone answering machine in his home. However he did not inform CES of that fact. In contrast Wolfsen applied at the very time that the Company needed a journeyman, evidently as a replacement for Darwin Patterson. As for Redner, I credit Tillman's testimony that he would not call an applicant who failed to give his or her telephone number. Tillman could reasonably infer that a person who failed to give this important information was not seriously interested in employment. CES had no bargaining relationship with the Union, and was under no obligation to call Redner's references in order to determine whether Redner was available for work. Therefore I am recommending that the pertinent allegations of the complaint be dismissed.

D. *Alleged Unlawful Company Statement and Refusal to hire or Consider Union Members or Adherents for Employment*

The remaining complaint allegations involve only the Company as respondent.

The Company conducts monthly breakfast meetings for its employees (one for those in the Grand Rapids area and another in the Kalamazoo area). Foremen would discuss the status of their projects. On or about January 17 Barry Allen attended his first breakfast meeting as a foreman, at a restaurant in Kalamazoo. Allen testified in sum as follows: Vice President Windemuller addressed the employees. He said the Company needed some manpower, and that the jobs were getting tight. Someone asked if there were any applications on file. Windemuller answered that they had a lot of applications from the Union. The audience broke into laughter. Windemuller then added that he checked with other contractors in the Grand Rapids area (referring to nonunion contrac-

tors), and they also had a lot of applications on file—also from the Union. Branch Manager Dedoes spoke next. He said that if anyone knew of journeymen electricians in the Kalamazoo area they should contact him, because they would be needing electricians. Allen's testimony concerning the meeting was undisputed.

On October 18, 1989, as previously described, the Company received applications from or by a total of 26 union members. As of January 17 none were hired. (The Company never hired any of them.) Windemuller referred to applications ''from the Union.'' He did not say union electricians or union members. The plain implication of Windemuller's remarks was that he was referring to the October 18 applicants, he regarded them as being ''from the Union,'' and the Company would not consider for employment those applicants whose manner of application indicated that they were likely to engage in union organizational activity. Dedoes lent further emphasis to Windemuller's remarks by indicating that the Company would look elsewhere and anywhere for journeymen electricians, notwithstanding the October 18 applications. As discussed, the applicants were employees entitled to the protection of the Act. I find that the Company, by Windemuller, violated Section 8(a)(1) by impliedly telling its employees that it would not consider active union adherents for employment. I further find that his statement may be considered as evidence of the Company's motivation in failing to hire the union adherents. Windemuller's statement that he had applications from the Union, may also be considered as evidence of the length of time the Company kept applications on file.

The parties stipulated that on October 18, 1989, company receptionist Jodie Dedoes, who passed out applications to the union member applicants, told 7 of them that their applications would be kept on file for 6 months. Jodie Dedoes was not presented as a witness. Vice President Windemuller testified in sum as follows concerning the Company's hiring procedure. The Company maintains three files for job applicants. They are respectively for (1) licensed electricians, (2) apprentices with electrical experience, and (3) applicants with no electrical experience. The Company hires experienced journeymen, but also trains employees in electrical work, including running cable lines. When the Company needs help, Windemuller will pull the appropriate file and review applications, beginning with the most recent. He does this because when the Company is busy, usually other contractors are also busy. Therefore earlier applicants would probably not be available. ''Basically,'' the Company ''will hold the applications for a period of generally 30 days, but it can be longer if we don't hire anybody in that interim.'' When Windemuller makes his selections, he will throw away the other applications, and accumulate a new batch to be available when the Company again needs help. The Company does not have a policy of keeping applications on file for 6 months, and Jodie Dedoes has no knowledge or authority to state the Company's hiring policy.

Windemuller further testified in sum as follows: When he reviews applications, he is particularly concerned with the applicant's references, kind of experience and where obtained, e.g., whether industrial or construction. Industrial experience is better for certain types of work, such as maintenance. When Windemuller makes a preliminary choice, he will call the best qualified person to inform him about the applicant's qualifications and work habits. He looks for applicants with references who work for the Company as these are reliable. Business references are also helpful. Prior work experience is important, and with apprentices, their education. Windemuller also checks whether the applicant lives in the area, has transportation, wants full-or part-time work, expected rate of pay (i.e., whether more than the Company pays), has physical impairments or a criminal record, has needed tools, and has experience on nonelectrical operating equipment. He also formerly checked whether the applicant completed an I-9 (citizenship information) form. Winde muller was under the impression that the applicant had to complete this form, and therefore attached the form to the application. However, he learned that the form was not necessary until a person was hired, and during 1990 withdrew the form from the application process. However he would not necessarily reject an applicant for a Kalamazoo job who did not live in that area, or lacked tools or business references, or failed to complete the I-9 form. He received the October 18 applications from Jodie Dedoes, placed them in the appropriate files and handled them in the usual manner. Most of these applicants were journeymen. He will consider IBEW members for hire. The Company annually receives over 100 job applications. Branch Manager Dedoes operated out of his home from June 1989 to January 1990, and had authority to hire employees in the Kalamazoo area. In January the branch began operating from an office in Cooper Township (suburb of Kalamazoo). Dedoes testified in sum as follows: If the Company is hiring, he receives applications, files them if they meet the Company's criteria, and keeps them on file for 30 days. He received applications at the jobsite and at his home when he used that as his office. He pulls out the applications, reviews them beginning with the most recent, and is particularly interested in those with references who are company employees or persons known to Dedoes. He posted a sign at the company trailer on the Upjohn project (as will be further discussed) that ''we do not accept applications at the job trailer.'' He did so because there was no one at the trailer qualified to interview or hire. However Dedoes admitted that he also posted the same sign at the Kalamazoo branch office.

I find that as of October 18, the Company had a practice of keeping job applications on file for 6 months. The Company placed Jodie Dedoes in a position where she had ostensible authority to answer questions concerning the application process. The inference is warranted that when she told the applicants that the applications would be kept on file for 6 months, she knew what she was talking about. If she did not know the policy, or had no authority to speak, she probably would have said so, or referred the inquiries to another person. If she spoke falsely, the inference is warranted that the Company sought to deceive union applicants. As indicated, in late January Windemuller indicated that the applications were still on file. It is also significant that the Company still had the October 18 applications as of February 2, when the Union filed its first unfair labor practice charges (Cases 7–CA–30178 and 7–CA–30190). The period from October to mid-April was the slow season in the construction industry. The Company's records indicated that it did relatively little hiring during this period, particularly when compared to the months of May, June, July, and August. Therefore the Company had reason to keep applications on file throughout this

period, in anticipation of greater needs with the coming of spring weather.

The Company's records, together with stipulations of the parties and testimony of Windemuller and Dedoes, indicates that during the period from October 18, 1989, through January 31, 1991, the Company hired (or in three instances recalled or rehired) some 44 employees. The Company did not have application forms for eight of these employees.[6] The hired employees included journeymen and apprentices. As indicated, the Company also borrowed employees from other nonunion contractors and obtained employees from CES during this period. Among the 26 union members who applied on October 18, their applications indicated 1 master electrician (Gary Van Koevering), 3 apprentices (Kevin McEntaffer, Christopher Pena, and Daniel Sidlauskas), and 2 licensed as journeymen in other states (Richard Howard and Richard Ringwald). The other 20 were Michigan-licensed journeymen.

Local 107 Organizer Wuelfing testified in sum as follows: In Western Michigan, two labor organizations, IBEW and CLA, represent electricians employed by construction electrical contractors. Among the applications (for 36 employees) stipulated into evidence, of employees hired by the Company during the period from October 18, 1989, through January 31, 1991, the initial (1987) application of Eugene Roberts indicated him to be a member of Local 131. (Thereafter he worked for the Company.) The application of Ted Hardiman indicated that from April 1987 to May 1988 he worked in the drafting department of a manufacturing firm, Kirchoff Flex Cable. At that time Local 107 represented a unit of the firm's employees, which did not include draftsmen. The application of Jack Osborn indicated that he worked for Kalamazoo Electric from October 1984 to April 1987, and thereafter for nonunion firms. Since 1989 the employees of Kalamazoo Electric have been represented by Local 131. However the firm was nonunion when Osborn worked there. (Osborn's application also indicates that he was trained in the ABC, i.e., open shop, apprenticeship program.) None of the other applications indicate employment by union contractors.

The complaint alleges that since on or about November 17, 1989, the Company has discriminatorily refused to hire or consider for employment the October 18 applicants. Therefore I shall not take into consideration the Company's hiring of three employees (Heintz, Swinehart, and Devries) during the period between October 18 and November 17, 1989, as unfair labor practice conduct. I find that the General Counsel presented a prima facie case that from November 20, 1989, until at least April 18, 1990 (6 months from October 18), the Company refused to hire or consider for employment the October 18 applicants, for positions for which they were qualified, because the Company believed that they were likely to engage in union organizational activity. As discussed, Windemuller made clear in January 1990 that he did not intend to hire or consider the applicants, whom he regarded as being from the Union. The Company never hired any of the applicants. Rather the Company consistently hired employees whose applications and records (with one exception) indicated a non-IBEW background. When the Company obtained union employees from CES, it promptly got rid of them when they indicated their intention to engage in organizational activity.

At this point, I shall consider the question of whether the Company has met its burden of establishing that it would not have hired the October 18 applicants, or any of them, in the absence of their union membership or activity. This necessitates consideration of individual hiring decisions. I shall first consider the period from November 17, 1989, to January 29, 1990, when some of the October 18 applicants reapplied, and Edwin Sturm applied for work with the Company. During this period the Company hired or recalled seven employees: Martin Proper on November 20, Daniel Kolehouse on December 4, Richard Coy and Michael Hudnall on January 22, Todd Meert and Eugene Roberts on January 23, and Brenda Jackson on January 29. The Company also obtained Robert Morrison from CES during this period. Hudnall and Roberts previously worked for the Company. The Company's records indicate that Hudnall was hired by the Company on June 15, 1987, laid off on February 2, 1989, recalled on January 22, 1990, and laid off on January 4, 1991. The records indicate that Roberts was hired on October 22, 1987, laid off on January 6, 1989, and rehired on January 23, 1990. Windemuller testified in sum as follows concerning the employees: He initially hired Proper as a truckdriver (Proper applied for a job as warehouse-driver). None of the October 18 applicants applied for such position. After some 6 or 7 months Proper asked to and was permitted to work on jobsite as an apprentice. In 1989 CES referred apprentice Kolehouse to work on a company job in Battle Creek. Kolehouse later applied directly for a job with the Company (November 5, 1989). Windemuller hired him as an apprentice on December 4. His application was the most recent on file and Foreman Gary Samons, on his own initiative, gave Kolehouse a high recommendation. His application indicated that he worked 12 years for Reynolds Metals, whose employees were represented by a union (not IBEW). (Kolehouse's application indicated that he was enrolled in the ABC apprenticeship program.) As indicated, Hudnall and Roberts previously worked for the Company. Hudnall is Black. Roberts was a journeyman and Hudnall was an apprentice. Windemuller assumed that Roberts was still an IBEW member, because he worked for Moore Electric, a union contractor. (Roberts' current application, filed on January 23, the day he was hired, did not list his employment record.) Apprentice Brenda Jackson applied on December 29, 1989. She was then working for another firm, but complained she was not learning anything. Her qualifications were good, and she was persistent in seeking employment with the Company. Windemuller knew one of her references, who gave her a good recommendation. When hired, her application was the most recent on file. Jackson has since become a journeyman. Branch Manager Dedoes hired Coy and Meert. Both were apprentices. Dedoes testified in sum as follows: Meert came to his home and made application (his application is dated November 9, 1989). At the time Dedoes considered him, Dedoes did not have any other applications on file. Company Superintendent Thompson and journeyman Larry Harness recommended Meert. Dedoes was also impressed by the fact that Meert ran a dairy farm, which would indicate good work habits. Coy also came to Dedoes' home and brought a resume. (His application is dated January 5.) When Dedoes reviewed Coy's application, he had one other apprentice application on file.

[6] Thomas Barnhardt, hired on August 6, was mistakenly listed as having no application.

Neither indicated IBEW background. Dedoes chose Coy because he had more experience than the other applicant.

Windemuller testified that he considered the October 18 applications. As indicated, during the period from October 18 to January 29 the Company hired or recalled one truckdriver, five apprentices, and one journeyman. Windemuller testified in sum concerning the three apprentices among the October 18 applicants. None of them ever again contacted the Company. He considered their applications at the time he hired apprentice Kirk DeVries on November 8, 1989. Christopher Pena did not indicate he had any friends or relatives working for the Company. His only indicated electrical experience was working as a cable puller for a firm in Germany called Elkom. Windemuller was not familiar with the firm, and Pena gave no other references. Pena indicated that he was a United States citizen, but did not complete the I-9 form. Daniel Sidlauskas gave no references to check. (In fact, he attached letters of reference from Guardsman Products, Inc., his most recent employer.) Sidlauskas' only indicated electrical experience was with Guardsman. However his low rate of pay ($4.50 to $6.25 per hour) did not suggest that he did skilled work. Sidlauskas' application did not indicate a union background. Kevin McEntaffer indicated that he was a fourth year apprentice, but did not list his employers and gave no references (McEntaffer indicated that he did electrical work for ''Local #275'' from 1986 to 1989). He did not complete the I-9 form. As for the selected applicant, Kirk DeVries, his application was the most recent on file at the time of selection. (DeVries applied on October 20.) DeVries indicated that he worked for three electrical firms (including Feyen Zylstra) and described his work. He listed two company personnel (Fred Syswerda and Jeff Newman) as references. Windemuller checked with Newman, who taught DeVries in an electrical apprenticeship training program. Newman spoke highly of DeVries. Windemuller concluded that DeVries was the best qualified of the four apprentice applicants.

Barry Allen testified in sum as follows: After the January breakfast meeting, Superintendent Thompson told him there were a lot of projects coming up, they were looking for journeymen, and would scrounge around wherever the Company could get them. Thompson said he would (and did) call Eugene Roberts, who had previously been laid off for lack of quality work. Roberts subsequently worked for Moore Electric, a union contractor, until he was laid off. Roberts reported to work with journeymen Syswerda and Fred Slot (both transferred from another job), recalled apprentice Hudnall, and newly hired apprentice Todd Meert. On their first day at work, Superintendent Strong had Roberts, Hudnall, and Meert fill out applications. Strong told Roberts that he needed to fill out a new application in order to update the information. The General Counsel did not present any other evidence concerning the qualifications of the applicants (successful or not) beyond that contained in their applications. On February 2 and 5 respectively, Locals 131 and 275 filed unfair labor practice charges, alleging that the Company violated Section 8(a)(3) by bypassing union applicants when it hired an electrician on January 22. The Board's Regional Director declined to proceed on the charge, noting that the hired employee (Roberts) was a member of Local 131 and qualified to perform the work for which he was recalled. No appeal was taken from this determination.

I find that the Company has met its burden of establishing that it would not have hired any of the October 18 applicants at any time through January 29, even in the absence of their union membership of activity. I specifically credit Windemuller's testimony that he considered the three apprentice applications filed on October 18, but that DeVries' application indicated that he would be a better choice. In so doing I have taken into consideration the pertinent applications and the criteria which Windemuller testified that he used in considering applicants. I find (as Windemuller himself admitted) that even in 1989 he would not reject an applicant for failure to complete the I-9 citizenship form. (The Company hired Proper and Coy, although they did not complete the form.) Even putting aside this factor, Windemuller would have hired DeVries. As discussed, the Company, at least as of October 1989, kept applications on file for 6 months. However, I credit Windemuller's testimony to the extent that I find that once having considered and rejected an applicant (as with Sidlauskas, Pena, and McEntaffer), Windemuller would not again consider that applicant if other qualified applicants were available. I also credit his testimony, and that of Dedoes, that they first considered the most recent applicant.[7] As for Roberts, he was as indicated the only journeyman hired by the Company during the period from October 24, 1989, through January 29, 1990. As the Regional Director's dismissal of the earlier charges was not appealed to the Board's General Counsel, the Regional Director's determination does not preclude reexamination of Robert's selection, in connection with the present charges. However, the reasoning of that earlier determination is persuasive. If the Company had a mindset at this point to avoid hiring union adherents who might engage in organizational activity, it is unlikely that the Company would do so by rehiring a former employee who it knew to be a union member. The Company had no assurance that Roberts would not engage in organizational activity. I find that the Company did not act unlawfully by recalling Roberts without considering the October 18 applicants. As the Company did not hire any other journeymen during the period from November 17, 1989, through January 29, 1990, it follows that the Company demonstrated that it would not have hired any of the nonapprentice October 18 applicants, even in the absence of their union membership or activity.

I shall next address the period from January 30 through April 25. Barry Allen testified in sum as follows: When Organizer Moldovan came to the Upjohn jobsite on January 29, he introduced himself, and Crabtree and Artz as applicants, to Superintendent Thompson. Thompson called Dedoes, who told him to take the applications. Thompson had no forms in the trailer, but Moldovan had company job applications. Crabtree and Artz filled out applications. Moldovan also presented applications from Sturm, Fragala, and Klocke on IBEW forms. After Moldovan, Crabtree, and Artz left, Thompson posted a sign on the trailer door stating that no job applications would be taken at this trailer as of this date.

During the period from January 30 through April 25 the Company hired four employees: Timothy Bartelds on February 6, John Garcia Jr. on March 12, John Halverson on

[7] The General Counsel does not contend that Todd Meert's November 9 application was a forgery. I find that he applied as indicated on that date.

March 19, and Jack Osborn on April 25. Osborne, formerly an employee of A & K Electric, worked for the Company as a borrowed employee for about 5 weeks in February and March. Windemuller testified in sum as follows: When the Union filed the initial unfair labor practice charges (February 2 and 5), he sent the October 18 applications to his attorney connection with the investigation. He did not retain copies for his files. All other 1989 applications would have been destroyed in accordance with his usual procedure. The January 29 applications received at the Upjohn jobsite, and the applications subsequently received in Kalamazoo, were not forwarded to the Company's Grand Rapids office. Among the October 18 applicants he would not have hired Gary Van Koevening, because he previously worked for the Company and left the jobsite without giving any notice. Windemuller hired Bartelds, whose application was the most recent (Bartelds applied on January 15). He had no electrical experience, but was persistent about wanting to get into the trade. He listed as references his brother and a journeyman electrician, who both worked for the Company. They said he would do an excellent job. Bartelds had a good work and school record. Windemuller checked with his current employer and other business references, and received favorable reports. Windemuller hired Garcia (Hispanic, applied on March 9). Garcia was a high school student and participating in an electrical training program. On recommendation from his instructor, the Company hired Garcia to do part-time general work. Upon completing high school the Company subsequently offered him an apprenticeship. Windemuller also hired Halverson (who applied on March 5). The Company's personnel record lists him as a cable lineman, but he was actually hired as a high voltage lineman, which is a specialized and more skilled position. Halverson graduated from a high voltage school and had experience with a utility company. Windemuller would not have hired a regular journeyman for this position. However a licensed journeyman or master electrician can probably do cable work. Dedoes hired Osborn (who applied on March 12). Dedoes testified that he knew and was satisfied with Osborn's abilities, as demonstrated by his working as an apprentice borrowed from A & K Electric. At the time Dedoes considered Osborn, he had no other apprentice applications on file.

I credit the testimony of Windemuller. I specifically find that the Company did not and could not consider the October 18 applications for a legitimate reason, namely, that Windemuller forwarded the applications to his attorney in connection with the investigation of the initial unfair labor practice charges. Among those applicants, only Artz, Crabtree, Fragala, and Klocke, all journeymen, renewed their applications (on January 29). Sturm, the other January 29 applicant, was also a journeyman. The October 18 applicants were aware, on the basis of what receptionist Jodie Dedoes told them, that their applications would be kept on file for a period of 6 months, i.e., until April 18, 1990. I specifically credit Windemuller's testimony that applications received in Kalamazoo were not forwarded to Grand Rapids. The General Counsel does not allege that any of the alleged discriminatees applied at Grand Rapids after October 18. I find that Windemuller did not, for valid reasons, have any applications from the alleged discriminatees in his file when he hired Halverson (the only journeyman hired during the period from January 30 through April 25). I find that the General Counsel failed to prove that the Company at any time since November 17, 1989, has discriminatorily refused to hire or consider for employment the 22 employees who applied on October 18 and did not thereafter reapply (Morris Applebey, Kathy Bolthouse, Larry Deltavin, Doug Harmon, Joe Haskins, Randy Horneber, Rick Howard, John Kemperman, David King, Bob Laben, Kevin McEntaffer, Chris Pena, Rick Ringwold, Don Sidlauskas, David Snoop, Robert Stark, Al Stone, Mark Szekely, Charles Thies, Gary Van Koevering, George Vorgias, and Randy Williams). I further find that the Company met its burden of establishing that it would not have hired any of the January 29 applicants during the period from January 29 through April 25, even in the absence of their union membership or activity. In sum, all were journeymen who applied at the Upjohn jobsite, the Company hired only one journeyman during this period, and Windemuller did not have the union members' applications in his file when he hired Halverson.

The complaint alleges one other alleged discriminatee who applied with the Company prior to April 25. The parties stipulated that Christopher Widner presented a job application at the Kalamazoo office on February 9 and a second application at that office in March. A copy of his first application, not obtained from the Company, was presented in evidence. The second application was not presented in evidence. Widner was not called as a witness. The February 9 application indicates that Widner was applying for a job as an apprentice or driver. The application contains nothing which would suggest that Widner was a union member. His only electrical training was in high school. He worked for two electrical firms, including Webb Electric, a union firm, but as a low paid helper doing general labor. As indicated, Branch Manager Dedoes testified that he kept applications for 30 days. I do not credit this assertion. Dedoes hired Todd Meert on January 23, although Meert applied on November 9, 1989. I find that Widner's applications were on file, or should have been in accordance with Dedoes' usual procedure, when Dedoes hired Jack Osborn. However, I find that the General Counsel failed to present a prima facie case that the Company discriminated against Widner for union related reasons. Specifically, the General Counsel failed to show that Widner was a union member or adherent, or that the Company had reason, even mistaken reason, to believe he was a union member or adherent. Therefore, whatever Dedoes' reason for disregarding Widner's application, the General Counsel failed to prove a reason prohibited by the Act.

On May 14, Robert Fragala, Pat Klocke, and Greg Wolff, a Local 131 member, went to the Company's Kalamazoo office and presented job applications. This was the third application for Fragala and Klocke and the first for Wolff. The May 14 applications, which were not presented in evidence, contained an entry on the form which indicated that they would be held for 30 days. Prior company forms did not contain such notice. Company records indicate the notation was placed on applications in May and June. Windemuller, in his testimony, professed to be unable to explain the change. The prior applications of Fragala and Klocke plainly indicated that they were union electricians. Fragala testified in sum that he again so indicated in his May 14 application.

At this point I shall consider the remaining six alleged discriminatees (Artz, Crabtree, Fragala, Klocke, Sturm, and Wolff). The record does not indicate Wolff's status. The

other five were journeymen. I shall specifically address the question of whether the Company discriminatorily refused to hire or consider them for employment during the period from April 26, 1990, through January 31, 1991. The Company did most of its hiring during the period from May 2 through September 10, the peak of the construction season. During this period the Company rehired 1 employee (Charles Kroodsma), recalled another (Steven Lewis), and hired 27 others. Thereafter the Company did no hiring until shortly before the present hearing, when it hired Kevin Gardner, who applied on January 30, 1991. Kroodsma, a journeyman, applied on April 23 and was hired on May 2. Windemuller testified that Kroodsma previously was employed by the Company in 1987, worked for about a year and a half, and was actually rehired on May 2. On May 2 the Company hired Jerome Keller, a self-employed master electrician. Windemuller testified that he hired Keller, who said he had nothing to do and needed work. Windemuller told Keller he would take him, probably only for a short period of time (Keller worked for the Company until October 5). Journeymen Timothy Duane and Adam Russell were hired by the Company on May 14. Their applications were dated May 5 and May 6 respectively. Branch Manager Dedoes testified that they applied on the same day, and that he hired both in accordance with his usual evaluation. On May 21 Windemuller hired apprentice Ted Hardiman and James Bazen, also unlicensed. Windemuller testified in sum as follows: He hired Hardiman, who is Black, Hardiman had a good work history, and he discussed Hardiman's performance with an owner of Johnson Electric, Hardiman's most recent employer (however Hardiman indicated on his application that he left Johnson Electric because of ''tardiness''). Windemuller also believed that hiring Hardiman would aid the Company in obtaining a Michigan Certificate of Awardability. Hardiman's application indicated that he worked for Smith Industries, a unionized (not IBEW) employer. Windemuller hired Bazen as summer help (he worked for the Company until October 5). Windemuller knew Bazen's father, who requested Windemuller to hire Bazen. Windemuller regarded Bazen as ''a very knowledgeable individual for the limited experience he had.'' On June 4 the Company hired Jeffrey Cook and Scott Meert. Cook applied on June 4. There is no application for Meert. The Company's records indicate that both were apprentices. Windemuller testified that Cook was hired by Superintendent Strong, who was knowledgeable about his background. Windemuller further testified that Scott Meert was actually hired as a truckdriver.

On June 5 the Company hired journeyman Salvador Logrande, whose application is dated June 4. Logrande's application correctly indicated that he worked only for nonunion electrical contractors, although he worked for a UAW organized manufacturer (Rapistan). The application did not indicate or suggest any IBEW affiliation. In fact Logrande was a union member or adherent who was referred to CES by the Union. Logrande, who was presented as a General Counsel witness, testified in sum as follows: In May he was laid off and looking for work. The Union suggested CES, among other prospects. He applied at CES and was interviewed by Tillman. About a week later Tillman said he had a job in Kalamazoo, but shortly thereafter told him that the job was done. A friend told him that the Company was hiring, and suggested that he contact Logrande's former supervisor, who now worked in the Company's field service department. Logrande contacted the person (Roger Klinge) who agreed to be his reference. Logrande applied at Grand Rapids (he listed Klinge on his application). A sign was posted on the door: ''Not accepting any applications.'' Logrande gave his resume to the receptionist. She said they were not hiring then, but she would pass on his resume to management. On Friday (June 1) Superintendent Strong called him, saying that he read Logrande's resume. Logrande mentioned Klinge. Strong indicated he would check with Klinge. Later that day Strong called back. He told Logrande to come in on Monday (June 4) and fill out an application (which he did). On Monday they discussed wages. Logrande requested $13 per hour. Strong said the starting pay was $10.90 per hour, but he could get a $2-per-hour raise within 90 days. Logrande agreed. He began work the next day, and continued to work for the Company until December 14, when he and other employees were laid off for lack of work. He did not disclose his union affiliation to management. Windemuller testified in sum as follows: Logrande was one of the 10 CES employees approved by him when he reviewed CES' files. After Logrande applied directly to the Company, both he and Strong interviewed him. Windemuller was under the mistaken belief that Logrande was a minority applicant, specifically, Hispanic. (In fact, he is of Italian ancestry.)

The Company did not hire any other employees during the 30 days following May 14. The next hire was Steven Lewis, on June 16. The Company's records indicate that Lewis, a journeyman who is Black, was hired on February 29, 1984, went on leave of absence on January 26, 1990, and returned on June 16, 1990. Windemuller testified that since hiring Logrande, he has not hired any journeymen for building and construction work. He hired Lewis as a cable foreman (rate of pay $14.76 per hour). The Company's records indicate that during the period from July 9 through September 10, the Company hired seven apprentices, one part-time apprentice, eight in the category of ''cable lineman,'' one shop employee, one truck driver, and one ''electrician.'' The cable linemen were hired at $10 per hour or less (one apprentice was hired at $10.75 per hour). Their applications indicate that they were not licensed journeymen. The ''electrician,'' Leonard Shilt, was hired on September 10 at a rate of $15.80 per hour (high by company standards). Windemuller testified that he hired Shilt as an electrician serviceman, the same job as performed by Roger Klinge. The work required extensive and specialized experience, and Shilt had the requisite experience.

Windemuller, in his testimony, did not claim that he considered any of the January 29 or May 14 union applicants when hiring during the period in question. This would be consistent with his position, which I have credited, that applications presented in Kalamazoo were not forwarded to Grand Rapids. Dedoes, in his testimony, also did not claim that he considered any of these applications. As to the January 29 applications, this would be consistent with his assertion, which I have not credited, that he did not keep applications more than 30 days. Dedoes further did not claim that he considered the May 14 applications when he hired journeymen Russell and Duane on May 14. As indicated, Dedoes testified that he had only the applications of Russell and Duane before him when he decided to hire them. The General Counsel failed to prove that Fragala, Klocke, and Wolff

presented their applications before Dedoes considered Russell and Duane. Therefore I credit Dedoes. Dedoes did not thereafter hire any journeymen.

The General Counsel did not present any evidence concerning Greg Wolff's qualifications. The parties simply stipulated that he was a member of Local 131. Therefore I find that the General Counsel failed to present a prima facie case that Wolff was qualified for any position for which the Company was hiring. I am therefore recommending that the allegation pertaining to him be dismissed. As to the remaining five alleged discriminatees, I find that the Company would not have hired them even in the absence of their union activity. Therefore the Company met its burden of proof in this regard. Although the evidence indicates that at least sometimes Dedoes kept applications on file for more than 30 days, it is unlikely that Dedoes or Windemuller would seriously consider applications over 3 months old, where the applicants had not contacted the Company since filing. By May 14 the construction season was under way. Experienced and qualified journeymen, even if unemployed in January, would probably be back at work by May. Moreover, the applications of Fragala, Artz, and Klocke are significant in this regard, even as to hiring decisions made after May 14, when Fragala and Klocke again applied. Their applications show them to be among the elite of union labor. (As indicated, Klocke and Fragala were president and vice president respectively of Local 131.) The applications of Fragala, Artz, and Klocke indicate they were continually employed in recent years, even through the winter, at union scale which ranged from $18 to $20 per hour (far above company pay). Sturm used a union application form and gave only sketchy information. However, his application indicated that as of January 29, he was currently employed with a union firm. It is evident that these applicants were not suffering from lack of employment, low wages, or lack of qualifying experience. Although Fragala, Klocke, and Artz indicated that wages were ''negotiable,'' it is unlikely that Windemuller or Dedoes would seriously believe that such electricians wanted to leave their current employment to work for the Company. The same is also true for others among the October 18 applicants. Indeed, Bob Loben indicated that he expected $18.80 per hour, and Gary van Koevering, $16.50 per hour. Plainly, such applications could not be taken seriously. In contrast, union member Salvador Logrande was unemployed when he sought work from CES and the Company. Logrande's experience also tends to corroborate the testimony of Windemuller concerning criteria used by the Company in selecting personnel. Logrande obtained company employment through the use of a personal reference who worked for the Company, and by his persistent efforts involving personal contact. It is evident, as Windemuller testified, that he regarded these as significant factors. The Act does not prohibit an employer from relying upon such criteria. In contrast the alleged discriminatees did not use company references, and made no efforts to seek employment with the Company beyond presenting their applications. I further find, in light of the factors discussed above, that the ''cable linemen'' hired by the Company during the period from July 9 through September 10 were not journeymen positions. Journeyman Steven Lewis was not a new hire, but an employee returning from a leave of absence. Charles Kroodsma was a rehired company employee. The only other persons hired by Windemuller for licensed positions during the period from April 26 through the end of 1991 were Jerome Keller, a master electrician hired as a personal favor, union member Logrande, and Leonard Shilt, hired for a specialized position. In sum, I find that the General Counsel failed to prove that the Company discriminatorily refused to hire or consider the union applicants for employment, and I am recommending that the pertinent allegations of the complaint be dismissed.

CONCLUSIONS OF LAW

1. The Company and CES are each employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. At all times material the Company and CES were and are joint employers of employees referred to the Company by CES.

3. Local No. 107, Local No. 131, and other Locals of International Brotherhood of Electrical Workers, AFL–CIO are labor organizations within the meaning of Section 2(5) of the Act.

4. By discriminatorily causing the layoffs of Larry Ketcham, Tom Sosnowski, and Steve Tishhouse, and by discriminatorily causing removal of William Quick from the Upjohn jobsite, thereby discouraging membership in the Union, the Company has violated and is violating Section 8(a)(3) of the Act.

5. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, the Company and CES have engaged, and are engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. The General Counsel has failed to prove that the Company or CES discriminatorily refused to hire, recall, or consider employees for employment because of their union or concerted activities or to discourage such activities.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that they be required to cease and desist therefrom and from like or related conduct, and to take certain affirmative action designed to effectuate the policies of the Act. As the employment involved was temporary, I shall not recommend a reinstatement remedy. However I shall recommend that Respondents be ordered to make whole Ketcham, Sosnowski, Tishhouse, and Quick for any loss of earnings or benefits they may have suffered by reason of the discrimination against them. I shall further recommend that Respondents be ordered to expunge from their records any reference to the employees' unlawful layoff or removal, and to inform them that its unlawful conduct will not be used as a basis for further personnel action against them. See *Sterling Sugars*, 261 NLRB 472 (1982). Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Hori-*

zons for the Retarded, 283 NLRB 1173 (1987).[8] It will also be recommended that the Company be required to preserve and make available to the Board or its agents, on request, payroll and other records to facilitate the computation of backpay and reimbursement due.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondents, Windemuller Electric, Inc., Grandville, Michigan, and Construction Employment Services, Inc., Wyoming, Michigan, joint employers, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in International Brotherhood of Electrical Workers, AFL–CIO, its constituent or affiliated local unions, or any other labor organization, by laying off, causing removal, or otherwise discriminating against employees because of organizational or other lawful union activity.

(b) Telling or suggesting to employees that they will not consider union electrician applicants for employment.

(c) Interrogating employees, including job applicants, concerning their union membership, activities, or sympathies.

(d) Prohibiting employees from wearing union stickers on their hardhats or other clothing.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Larry Ketcham, Tom Sosnowski, Steve Tishhouse, and William Quick for any losses they suffered by reason of the discrimination against them, as set forth in the remedy section of this decision.

(b) Expunge from their files any reference to the layoff or removal of Ketcham, Sosnowski, Tishhouse, and Quick, and notify each of them in writing that this has been done and that evidence of such actions will not be used as a basis for future personnel actions against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post copies of the attached notice marked ''Appendix.''[10] Copies of said notice on forms provided by the Regional Director for Region 7, after being signed by Respondent's authorized representatives, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondents have taken to comply.

[8] Under *New Horizons*, interest on and after January 1, 1987, is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in International Brotherhood of Electrical Workers, AFL–CIO, its constituent or affiliated local unions, or any other labor organizations, by laying off, causing removal, or otherwise discriminating against employees because of organizational or other lawful union activity.

WE WILL NOT tell or suggest to employees that we will not consider union electrician applicants for employment.

WE WILL NOT interrogate employees, including job applicants, concerning their union membership, activities, or sympathies.

WE WILL NOT prohibit employees from wearing union stickers on their hardhats or other clothing.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights to guaranteed you by Section 7 of the Act.

WE WILL make whole Larry Ketcham, Tom Sosnowski, Steve Tishhouse, and William Quick for losses they suffered by reason of the discrimination against them, with interest.

WE WILL expunge from our files any reference to the layoff or removal of Ketcham, Sosnowski, Tishhouse, and Quick, and notify them in writing that this has been done and that evidence of our unlawful actions will not be used as a basis for future personnel actions against them.

WINDEMULLER ELECTRIC, INC.